

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT RAMESES,

Petitioner,

No. CIV S-04-1173 GEB GGH P

vs.

SCOTT KERNAN,

Respondents.

ORDER

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This is the second of petitioner's motions, made purportedly pursuant to Fed. R. Civ. P. 60(b), in this matter, and it is inexplicably entirely duplicative of the initial motion which has previously been dismissed. As was noted with the first such motion, in the Findings and Recommendations, filed on October 8, 2010, and adopted by Order, filed on December 13, 2010, this petition for writ of habeas corpus was denied on March 31, 2008, and judgment entered accordingly, after which petitioner appealed to the Ninth Circuit. On April 27, 2010, the mandate of the Ninth Circuit was filed in the district court's case docket, directing that the Ninth Circuit's February 18, 2010, judgment affirming the judgment of the district court take effect.<sup>1</sup> See docket # 82 and # 83. Notwithstanding, petitioner once again purports to proceed in this

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<sup>1</sup> Thereafter, on August 23, 2010, the Ninth Circuit ruled that petitioner had not demonstrated that this case warranted intervention by the extraordinary remedy of mandamus, denied the motion to proceed in forma pauperis as moot, and ordered that no further motions would be filed or entertained in the closed docket. See docket # 84.

1 court, pursuant to Fed. R. Civ. P. 60(b), on a motion for relief from final judgment, a motion that  
 2 is entirely duplicative of the initial motion, which was dismissed by Order, filed on December  
 3 13, 2010. Docket # 89, adopting Findings and Recommendations, filed on October 8, 2010.  
 4 The initial Rule 60(b) motion, exactly as is this second wholly inapposite such motion, is  
 5 predicated on alleged defects in the proceedings within the district court, including the court's  
 6 having appointed the Federal Defender to represent him.

7 As petitioner was previously informed:

8 Under Rule 60(b), a party may seek relief from judgment and to  
 9 re-open his case in limited circumstances, "including fraud,  
 10 mistake, and newly discovered evidence." Gonzalez v. Crosby, 545  
 11 U.S. 524, 528, 125 S.Ct. 2641, 2645-46, 162 L.Ed.2d 480 (2005).  
 12 Under Rule 60(b) (6), the catchall avenue by which petitioner  
 13 presumably also seeks to proceed to reopen his case, one must  
 14 demonstrate "any ... reason justifying relief from the operation of  
 15 the judgment" in situations that are not addressed by the specific  
 16 circumstances delineated in Rule 60(b)(1)-(5). Gonzalez v. Crosby,  
 17 545 U.S. 524, 528-529, 125 S.Ct. 2641, 2646, 162 L.Ed.2d 480  
 18 (2005). A purported Rule 60(b) motion seeking to reopen the  
 19 judgment of an initial habeas petition brought pursuant to 28  
 20 U.S.C. § § 2254, 2255 is in essence a successive petition, under 28  
 21 U.S.C. § 2244(b) where it "seeks to add a new ground for relief,"  
 22 or "if it attacks the federal court's previous resolution of a claim on  
 23 the merits ..." Gonzalez, at 532, 125 S.Ct. at 2648 [emphasis  
 24 added]. "[A] 'claim' as used in § 2244(b) is an asserted federal  
 25 basis for relief from a state court's judgment of conviction." Id., at  
 26 530, 125 S.Ct. at 2647.

18 Petitioner protests that he is not herein attacking the district court's  
 19 previous decision on the merits but on "procedural" grounds. He  
 20 accuses the district court of being part of some type of scheme to  
 21 not reach the merits of the arguments petitioner desired the court to  
 22 reach. The undersigned is not persuaded. This is nothing but a  
 23 transparent attempt to attack the final decision of the district court  
 24 along with its interlocutory rulings which indeed did address every  
 25 cognizable claim raised by petitioner on the merits.<sup>2</sup>  
 26 Thus, at most, petitioner's motion is construed as a successive

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24 <sup>2</sup> To the extent that the court would view petitioner's attack on the rubric of a Rule 60 (b)  
 25 motion, the conclusions of district court complicity with whomever to deny petitioner a ruling on  
 26 the merits are baseless and frivolous. As indicated in the Findings and Recommendations  
 adopted by the district court, the undersigned took pains to independently review the merits of  
 what the undersigned viewed as complex claims. The claims were decided with a lengthy  
 explanation and analysis.

petition. Under Ninth Circuit Rule 22-3, “[i]f a second or successive petition or motion, or an application for leave to file such an application or motion, is mistakenly submitted to the district court, the district court shall refer it to the court of appeals.” The district court has discretion to either transfer that petition to the court of appeals or to dismiss the petition. United States v. Winestock, 340 F.3d 200 (4<sup>th</sup> Cir. 2003)(§ 2255 case); Robinson v. Johnson, 313 F.3d 128, 139-140 (3<sup>rd</sup> Cir. 2002). In this case, the undersigned will recommend dismissal of the motion, rather than a transfer of the motion to the Ninth Circuit. This court does not have jurisdiction to consider the successive petition without prior authorization by the Ninth Circuit.

Findings and Recommendations, filed on October 8, 2010, pp. 2-3 (docket # 87), as noted, adopted by Order, filed on December 13, 2010 (docket # 89). In this instance, however, petitioner’s filing will be stricken from the case docket as duplicative.

Accordingly, IT IS ORDERED that petitioner’s second motion for relief from judgment pursuant to Rule 60(b), filed on January 18, 2011 (docket # 90), is stricken as wholly duplicative of his previously dismissed Rule 60(b) motion.

DATED: April 25, 2011

/s/ Gregory G. Hollows

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UNITED STATES MAGISTRATE JUDGE

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